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IN THE

Supreme Court of the United States

No. 973—October Term, 1961

NATIONAL BISCUIT COMPANY,
Petitioner

against

THE STATE OF NEW YORK,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

The opinion of the Court of Claims of the State of New York (MAJOR, J.), dated June 30, 1960, is reported at 24 Misc. 2d 106, 203 N. Y. S. 2d 462 (R. pp. 17-28; Appendix to Pet., pp. 17-19).

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, dated February 23, 1961, is reported at 12 A. D. 2d 998, 211 N. Y. S. 2d 435 (R. pp. 268-270; Appendix to Pet., pp. 20-21).

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, upon reargument, dated September 22, 1961, is reported at 14 A. D. 2d 729, 219 N. Y. S. 2d 905 (R. pp. 301-302; Appendix to Pet., p. 22).

The memorandum decision of the Court of Appeals of the State of New York, dated February 22, 1962, is reported at 11 N. Y. 2d 743, 181 N. E. 2d 457 (Appendix to Pet., p. 13).

Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court under 28 U. S. C. § 1257(3).

Questions Presented

In *Selig* v. *State of New York*, 10 N. Y. 2d 34, 176 N. E. 2d 59 (1961), the Court of Appeals held that there was no change of grade and that the claimant had no right, vested or otherwise, to abut upon a 100-foot wide highway. Diversion of traffic and circuity of access were held to be *damnum absque injuria*. The decision in the case at bar was based upon *Selig*. The petitioner raises the question whether the failure of the Court of Appeals to recognize liability in this case does not deprive it of due process of law and just compensation.

The petitioner also asserts that it was entitled to compensation for loss of the right of access to the main highway upon which its property abutted under the decisional law in existence at the time it purchased the property, and that by virtue of such alleged decisional law its right to compensation was "guaranteed". Upon the assertion that the decision of the Court of Appeals in the *Selig* case overruled and changed the prior decisional law it now inquires of this Court whether such change in the law does not violate the constitutional provision dealing with the impairment of the obligation of a contract.

Constitutional Provisions and Statutes Involved*

U. S. Constitution, Art. I, § 10; Amendments V and XIV.

Second Class Cities Law of State of New York § 99 (Vol. 52, McKinney's Laws of New York, page 61).

Statement

The decision in the case at bar was based on the prior decision of the Court in *Selig* v. *State of New York*, *supra*. In *Selig* the center section of an existing street, 100 feet wide, upon which the east side of the claimant's land abutted, had been changed to a limited-access highway and elevated between 6½ and 11 feet above the established grade. However, the claimant's land retained on its east side free and uninterrupted access to a service road for southbound traffic. The service road was 27 feet wide and, concededly, was at the same grade as the original street. The streets which bounded the land on the north and west sides thereof were unaffected.

The facts in the case at bar were identical with *Selig* except that the center expressway section of the highway was depressed 15 feet and the contiguous service road was 32 feet wide.

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* The pertinent provisions are set forth in the Appendix to the Petition, page 16.

ARGUMENT

POINT I

The judgment does not violate the "due process" or "just compensation" provisions of the Constitution.

Petitioner contends that the failure of the Court of Appeals to recognize liability for the alleged change of grade and its concomitants, diversion of traffic, circuity of access and loss of view, constitutes a violation of the constitutional provisions relating to "due process" and "just compensation".

Insofar as the alleged change of grade is concerned the Court of Appeals found in the instant case, as it did in *Selig* v. *State of New York*, 10 N. Y. 2d 34, 176 N. E. 2d 59 (1961), that there was no change of grade. Insofar as consequential damages were claimed by reason of circuity of access, diversion of traffic, loss of view, and the fact that petitioner's property does not abut or front directly upon the expressway section of the arterial highway, the Court of Appeals affirmed on the basis of *Selig supra*, in which it had held that such elements are not legally cognizable or compensable factors.

The judicial determination of compensability or the extent thereof does not create any question under the constitutional provisions. The question of whether an injury is *damnum absque injuria* or the question of the amount of compensation which is to be paid to an owner by reason of an act of eminent domain is a judicial question (*Chicago, B. & Q. Co. v. Chicago*, 166 U. S. 226, 246 [1897]; *McCoy v. Union Elevated R. R. Co.*, 247 U. S. 354, 363 [1918]).

This Court has held that as long as compensation is made or provided for, the determination of the amount of the compensation does not present a substantial Federal question under the due process provision of the Fourteenth Amendment (*Appleby v. Buffalo*, 221 U. S. 524, 531-533 [1911], affg. 189 N. Y. 163, 81 N. E. 954 [1907]). In the cited case the Court of Appeals had held in a condemnation proceeding that the condemnee was entitled only to nominal damages.

In *Provo Bench Canal Co. v. Tanner*, 239 U. S. 323 (1915), affg. 40 Utah 105, 121 Pac. 584 (1911), this Court held that in eminent domain proceedings an award of one dollar for property taken for an easement does not deprive the owner of his property without due process of law if the State Court recognized the right to recover for any substantial damage, but found as a matter of fact that no damage whatever had been shown.

Dispositive of the claim of alleged deprivation of due process is *McGovern v. City of New York*, 229 U. S. 363, 370-371 (1913), affg. 195 N. Y. 573, 88 N. E. 1132 (1909), which involved the validity of an award in a condemnation proceeding. Mr. Justice Holmes, writing for the Court, said that not every judgment by which a man gets less than he ought to and in that sense is deprived of his property can come to this Court. He added that when property is taken by eminent domain there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally.

POINT II

Assuming, *arguendo*, that the decision of the Court of Appeals in *Selig* v. *State* constituted a reversal or overruling of prior decisional law, such reversal does not constitute an impairment of any "contract" based upon the prior law.

Analysis of *Selig* v. *State*, *supra*, reveals that the decision of the Court of Appeals was declaratory of the existing law. No principles of liability were either explicitly or implicitly overruled. Even the dissenting Judges did not disagree with the conclusion of the Court on the question of law. They merely held that the question of change of grade had been affirmatively found, *as a fact*, by both Courts below and, therefore, was not open to review in that Court. This affords cold comfort to the petitioner in the case at bar because in the instant case the Court of Appeals, upon the authority of *Selig* v. *State*, has held that there was no change of grade.

Petitioner now injects a contention that the decision of the Court below in the instant case* results in a violation of the provision of the Federal Constitution, Art. I, § 10, Cl. 1, that

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

Assuming, *arguendo*, that the decisions in *Selig* and in the case at bar did change prior decisional law, it must be observed that the term "Law" in the constitutional provision comprises statutes, constitutional provisions, municipal ordinances, and administrative regulations having the

* Necessarily, this contention is also addressed to the Court's determination in *Selig* v. *State*, *supra*.

force and operation of statutes. (As to statutes and State constitutional provisions: *Bier* v. *McGehee*, 148 U. S. 137, 140 [1893]; as to municipal ordinances: *Cuyahoga Power Co.* v. *City of Akron*, 240 U. S. 462 [1916]; as to administrative regulations: *Appleby* v. *Delaney*, 271 U. S. 403, 409 [1926].)

How is it as to judicial decisions? Not only does the abstract principle of the separation of powers forbid the idea that the Courts "make" law, but the word "pass" in the constitutional provision connotes that the concept of law is confined to the formal and acknowledged methods of exercise of the legislative or law-making function. Accordingly, this Court has frequently said that Art. I, § 10, Cl. 1 does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights. (*Barrows* v. *Jackson*, 346 U. S. 249, 260 [1953].)

In *Sa er* v. *City of New York*, 206 U. S. 536 (1907), it is interesting to note that the claimed "impairment" did not arise from the decision of the Court of Appeals, but from the statute which authorized the construction of the viaduct, as construed by that Court. This Court held (p. 549) that on this premise the case came within the authority of *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544 (1905), which also involved an interpretation of a statute by the New York Court of Appeals. Indeed, this very distinction was made by this Court in *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924), at pages 452-453:

> "Other cases cited are *Louisiana* v. *Pilsbury*, 105 U. S. 278, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, but in each of them a statute had been passed subsequently to the contract involved and was held to impair it. In such a case this Court accepts the meaning put upon the impairing statute by the state court as authoritative, *but it is the statute as enforced*

by the State through its courts which impairs the contract, not the judgment of the court." (Emphasis added.)

After further discussion of several other classes of cases, the Court made the following distinction (pp. 453-454):

> "The difference between all these classes of cases and the present one wherein it is claimed that a state court judgment alone, and without any law, impairs the obligation of a contract, has been carefully pointed out in *Central Land Co.* v. *Laidley*, 159 U. S. 103, 111, 112, in *Bacon* v. *Texas*, 163 U. S. 207, 221, 223, and in *Ross* v. *Oregon*, 227 U. S. 150, 161. Certain unguarded language in *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206; *Butz* v. *Muscatine*, 8 Wall. 575, 583, and in *Douglas* v. *Pike County*, 101 U. S. 677, 686-687, and in some other cases, has caused confusion, although those cases did not really involve the contract impairment clause of the Constitution."

Implicit in the rationale of the foregoing cases is the fundamental concept, especially true of a Court of last resort, that there is no special sanctity in precedent. Inability to correct past error, to adapt to the *mores* and progress of today, necessarily must result in stultification and a weakening of authority. "*Stare decisis*", as Mr. Justice BRANDEIS said, "is ordinarily a wise rule of action. But it is not a universal, inexorable command." (Dissent in *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219, 238 [1924].) As ROSCOE POUND put it: "Law must be stable, and yet it cannot stand still." (*Interpretations of Legal History*, p. 1.) And Mr. Justice CARDOZO: "Hardly a rule of today but may be matched by its opposite of yesterday." (*Nature of the Judicial Process* [1957 ed.], p. 26.) In the same work (CARDOZO, *op. cit., supra*) we find the following (pp. 27-28):

> "These changes or most of them have been wrought by judges. The men who wrought them used the same tools as the judges of today. The changes, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify: it has been to revolutionize and transform. For every tendency, one seems to see a counter-tendency; for every rule its antinomy. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming.'"

See also, CARDOZO, *op. cit., supra*, pp. 161-162 and CARDOZO, *Paradoxes of Legal Science*, p. 29.

There is no need to labor the point. Hardly a term goes by that this Court, in recognition of its proper function, does not abandon an established concept as outmoded, obsolete, ill-adapted to the exigencies of the present or ill-conceived in the first instance and slavishly adhered to by the process of judicial inertia. Fortunately, a healthy judicial skepticism can be depended upon to make the needed adjustments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York, May 30, 1962.

Respectfully submitted,

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